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CPLR 302(b): Long-Arm Statute Unavailable in Action Seeking Determination of Paternity and Payment of Child Support Against Nonresident

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visions was at issue. The Court, reasoning that the intent of the statute and the policy of preventing the probate of fraudulent wills required a witness to testify as to the contents of the will, held that the copy could not be admitted if the witness only testifies as to its genuineness. The discussion of *Kleefeld* notes the hardship placed on the proponent of the lost will and suggests that the witness' recollection should be permitted to be refreshed by the copy of the will.

The viability of limitations on the incorporation of municipalities when the preservation of a comprehensive growth plan is at stake was presented to the Appellate Division, Second Department, in *Marcus v. Baron.* Emphasizing the public policy considerations underlying the plans, the court held that localities were not prevented from enacting supplemental incorporation criteria although the Village Law sets forth such criteria.

In the area of criminal law and procedure, the Court of Appeals decided *People v. Ferrara* and *Virag v. Hynes.* The right to counsel of a linen supplier subpoenaed by a grand jury investigating nursing home operator kickbacks was at issue in *Ferrara.* Holding that no error was committed in denying the motion to suppress, the Court of Appeals reasoned that no right to counsel had attached since the interrogation by an informant uncovered the intent to commit future crimes. The Court noted that right to counsel was intended to protect the individual from the powerful machinery of the state and not from the investigation of new, yet to be committed, crimes.

In *Virag v. Hynes,* the Court of Appeals noted the presumption of validity afforded a grand jury subpoena duces tecum and held that the party contesting the validity of the subpoena must establish that the materials sought lack relevancy to the investigation. Moreover, it was reasoned that the proper functioning of the grand jury investigatory process necessitated a broader scope of relevancy and the concomitant increased burden placed on the challenging party.

CIVIL PRACTICE LAW AND RULES

Article 3—Jurisdiction and Service, Appearance and Choice of Court

CPLR 302(b): Long-arm statute unavailable in action seeking determination of paternity and payment of child support against

nonresident

CPLR 302(b) permits the exercise of jurisdiction over a nonresident in a family court proceeding when the case involves an obligation to pay support which has accrued under New York law.[1] It has been unclear whether one seeking a declaration of paternity against a nonresident can benefit from this provision by alleging that an "obligation" to pay child support has accrued.[2] Recently, in *Nilsa B.B. v. Clyde Blackwell H.*,[3] the Appellate Division, Second Department, held that an obligation to pay support does not accrue until "the parental tie has been determined to exist."[4]

In *Nilsa*, the respondent, a resident of Missouri, made occasional visits to New York to solicit business for his book company.[5] The petitioner, a resident of New York, alleged that she had formed an intimate relationship with the respondent and had en-

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[1] CPLR 302(b) provides in pertinent part:

> A court in any matrimonial action or family court proceeding involving a demand for support [or] alimony . . . may exercise personal jurisdiction over the respondent or defendant notwithstanding the fact that he or she no longer is a resident or domiciliary of this state . . . if the party seeking support is a resident of or domiciled in this state at the time such demand is made, provided that this state was the matrimonial domicile of the parties before their separation, or the defendant abandoned the plaintiff in this state, or *the obligation to pay support, [or] alimony . . . accrued under the laws of this state* or under an agreement executed in this state.

CPLR 302(b) (McKinney Supp. 1981-1982) (emphasis added).

[2] At common law, there existed no obligation to support a child born out of wedlock. Schneider v. Kennat, 267 App. Div. 589, 591, 47 N.Y.S.2d 180, 182 (1st Dep't 1944); Carolyn C. v. Frank G., 106 Misc. 2d 510, 513, 434 N.Y.S.2d 98, 101 (Family Ct. N.Y. County 1980). To remedy this situation, the New York legislature enacted the Family Court Act (the Act). The Act establishes that each parent must provide "for the necessary support and education" of an illegitimate child. N.Y. FAM. CT. ACT (29A) § 513 (McKinney 1975). Under the Act, the family court has exclusive original jurisdiction in proceedings to establish the paternity of, and to order support for, illegitimate children. N.Y. FAM. CT. ACT (29A) § 511 (McKinney 1975 & Supp. 1981-1982). Although it has been said that the Act is ordered toward determining the paternity of a child born out of wedlock as well as providing for its support, Hough v. Light, 275 App. Div. 299, 300, 89 N.Y.S.2d 361, 363 (1st Dep't 1949); Geraldine K. v. Elliot D. B., 99 Misc. 2d 720, 722, 417 N.Y.S.2d 182, 183 (Family Ct. Bronx County 1979), it is clear that the primary purpose of the statute is to protect the welfare of the illegitimate child. *See, e.g., In re* J., 50 App. Div. 2d 890, 891, 377 N.Y.S.2d 530, 531 (2d Dep't 1975); Lock v. Fisher, 104 Misc. 2d 656, 660, 428 N.Y.S.2d 868, 871 (Family Ct. Westchester County 1980); Johnson v. Berger, 51 Misc. 2d 513, 515, 273 N.Y.S.2d 484, 487 (Family Ct. N.Y. County 1966).

[3] 84 App. Div. 2d 295, 445 N.Y.S.2d 579 (2d Dep't 1981).

[4] *Id.* at 298, 445 N.Y.S.2d at 582.

[5] *Id.* at 300, 445 N.Y.S.2d at 583. It was alleged that between April 1977 and July 1979 the respondent came to New York every other week, remaining within the state for 1 to 3 days each time he visited. *Id.* at 295 & n.1, 445 N.Y.S.2d at 580 & n.1.

gaged in sexual intercourse with him while he was visiting the state.[6] A child was born as a result of this relationship, and the respondent voluntarily provided the petitioner with support for the child.[7] When the payments ceased, the petitioner instituted a family court proceeding, seeking a determination of paternity and an order of support.[8] A summons and petition were served by personal delivery to the respondent in Missouri.[9] The Family Court, Rockland County, dismissed the petition, finding that there was no basis to support an assertion of jurisdiction over the respondent.[10]

On appeal, the Appellate Division, Second Department, affirmed,[11] holding that before a court may exercise 302(b) jurisdiction over a respondent in a paternity proceeding, an order establishing paternity must already be in effect.[12] When paternity has not yet been established, the court reasoned, an "obligation" to pay support has not "accrued" within the meaning of the statute.[13] The court observed that although the "cause of action [for sup-

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[6] *Id.* at 295, 445 N.Y.S.2d at 580.

[7] *Id.* at 296, 301, 445 N.Y.S.2d at 580, 583.

[8] *Id.* at 296, 445 N.Y.S.2d at 580.

[9] *Id.* The petitioner conceded that the respondent was a resident of Missouri at the time process was served, and did not allege that he was a New York domiciliary. *Id.* at 301, 445 N.Y.S.2d at 583.

[10] *Id.* at 296, 445 N.Y.S.2d at 580-81.

[11] *Id.*, 445 N.Y.S.2d at 581. Although all four members of the panel joined the majority opinion, written by Justice Margett, Presiding Justice Lazer and Justice Cohalan also concurred separately to express their discomfort with the present state of the law since it "prevents New York residents from litigating here what properly should be litigated here." *Id.* at 307, 445 N.Y.S.2d at 587 (Lazer, P.J., concurring).

[12] *Id.* at 297, 445 N.Y.S.2d at 581; *accord,* Anonymous v. Anonymous, 104 Misc. 2d 611, 614, 428 N.Y.S.2d 608, 610 (Family Ct. N.Y. County 1980); *see* Sciame v. Sciame, 54 App. Div. 2d 977, 977, 389 N.Y.S.2d 30, 31 (2d Dep't 1976); 1 WK&M ¶ 302.19, at 3-137. After rejecting the petitioner's assertions that jurisdiction could be sustained under CPLR 302(b), the court considered the applicability of CPLR 301, which provides that jurisdiction can be exercised "over persons . . . as might have been exercised heretofore." CPLR 301 (1972). The court focused upon the traditional view that one can be served within a state in which he is present. 84 App. Div. 2d at 303, 445 N.Y.S.2d at 585. Recognizing that personal jurisdiction has been exercised over individuals doing business in New York under this "presence" doctrine, *id.* at 306, 445 N.Y.S.2d at 586; *see* ABKO Indus., Inc. v. Lennon, 52 App. Div. 2d 435, 440, 384 N.Y.S.2d 781, 784 (1st Dep't 1976), the court nonetheless rejected the petitioner's attempt to benefit from this doctrine. 84 App. Div. 2d at 306, 445 N.Y.S.2d at 586. The court reasoned that application of the corporate presence doctrine to individuals is an unwarranted extension of common-law principles, and that, in any event, the respondent was not doing business at the time the action was commenced. *Id.*

[13] 84 App. Div. 2d at 297, 445 N.Y.S.2d at 581. The court assumed that the respondent had not met the threshold requirement of 302(b) that the nonresident must have been "a resident or domiciliary of this state" at one time. *Id.* at 297 n.3, 445 N.Y.S.2d at 581 n.3; *see* CPLR 302(b) (McKinney Supp. 1981-1982).

port] accrues upon pregnancy," the corresponding obligation does not accrue until "the cause of action has been found to have merit."[14] Hence, the court concluded, the proviso in CPLR 302(b) regarding the accrual of an obligation to pay support was not intended to permit the assertion of jurisdiction over a nonresident upon mere allegations of paternity.[15]

It is submitted that the *Nilsa* court has frustrated the legislature's attempt to broaden the availability of long-arm jurisdiction in family court proceedings. By requiring the entry of a judicial order or decree establishing paternity as a condition precedent to the exercise of personal jurisdiction under CPLR 302(b),[16] the court appears to have limited the utility of the statute's proviso that jurisdiction can be premised upon obligations accruing under New York law.[17] Clearly, if a court has entered a prior decree establishing paternity and ordering support, it must have already exercised jurisdiction over the respondent's person.[18] Once such an

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[14] 84 App. Div. 2d at 298, 445 N.Y.S.2d at 582.

[15] *Id.* at 299, 445 N.Y.S.2d at 582.

[16] Although some courts have construed CPLR 302(b) in a manner consistent with the *Nilsa* court's interpretation, *see, e.g.*, Anonymous v. Anonymous, 104 Misc. 2d 611, 614, 428 N.Y.S.2d 609, 610 (Family Ct. N.Y. County 1980), others indicate that the entry of a prior order or decree is not a prerequisite to the accrual of an obligation under the statute. *See* Gersten v. Gersten, 61 App. Div. 2d 745, 745, 401 N.Y.S.2d 806, 808 (1st Dep't 1978); Browne v. Browne, 53 App. Div. 2d 134, 137, 385 N.Y.S.2d 983, 986 (4th Dep't 1976); Crofton v. Crofton, 106 Misc. 2d 546, 548-49, 434 N.Y.S.2d 116, 118 (Sup. Ct. Nassau County 1980); Geiser v. Geiser, 102 Misc. 2d 862, 866, 424 N.Y.S.2d 852, 854 (Sup. Ct. N.Y. County 1980).

[17] It has been suggested that a petitioner, who is unable to benefit from CPLR 302(b) because a prior order of paternity is lacking, "might proceed under the Uniform Support of Dependents Law (DRL, art. 3-A (McKinney 1977 & Supp. 1981-1982))." Anonymous v. Anonymous, 104 Misc. 2d 611, 616, 428 N.Y.S.2d 608, 612 (Family Ct. N.Y. County 1980). Under this statutory scheme, a petitioner may initiate a proceeding for child support in her own state, and cause the litigation file to be transported to the state which can exercise jurisdiction over the respondent's person and enter an order for support. *See* DRL § 41 (1977). It is submitted, however, that this alternative is not feasible because the New York courts have held that the statute does not apply to proceedings designed to yield the initial order of paternity against the nonresident respondent. Recognizing this situation, the courts have urged petitioners to base their suits upon article 5 of the Family Court Act. *See* Martha D. v. Ronald C. D., 99 Misc. 2d 334, 335, 416 N.Y.S.2d 186, 187 (Family Ct. N.Y. County 1979); Gloria M. v. Frank T., 66 Misc. 2d 1096, 1097, 322 N.Y.S.2d 834, 835 (Family Ct. N.Y. County 1971). The *Nilsa* holding, however, appears to have eliminated this alternative.

[18] *See, e.g.*, Anonymous v. Anonymous, 104 Misc. 2d 611, 615, 428 N.Y.S.2d 608, 611 (Family Ct. N.Y. County 1980). It appears that in order to invoke the family court's limited paternity jurisdiction, the petition must not only seek an order of filiation but must also seek support for the child. *E.g.*, Salvatore S. v. Anthony S., 58 App. Div. 2d 867, 867-68, 396 N.Y.S.2d 872, 872-73 (2d Dep't 1977); Edward K. v. Marcy R., 106 Misc. 2d 506, 507, 434

order has been entered, principles of continuing jurisdiction[19] would render resort to CPLR 302(b) unnecessary in a subsequent proceeding.[20] Hence, by equating an obligation accruing under New York law with a prior order of a family court, the *Nilsa* court apparently has transformed the "obligation" proviso of the statute into mere surplusage. Since the legislature enacted CPLR 302(b) in order to remove the jurisdictional barriers facing deserted women whose "families might [otherwise] 'wind up on welfare,' "[21] it

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N.Y.S.2d 108, 109 (Family Ct. Kings County 1980); Czajak v. Vavonese, 104 Misc. 2d 601, 601, 609, 428 N.Y.S.2d 986, 986, 992 (Family Ct. Onondaga County 1980). *But see* John J. S. v. Theresa L., 99 Misc. 2d 578, 578-82, 416 N.Y.S.2d 1000, 1001-03 (Family Ct. Bronx County 1979). The reasoning used to support this conclusion appears to rest on the unique nature of a declaratory judgment. A declaratory judgment is an unconventional remedy, only available where it will serve some practical and useful purpose. *See, e.g.*, Krieger v. Krieger, 25 N.Y.2d 364, 366, 254 N.E.2d 750, 750, 306 N.Y.S.2d 441, 442 (1969); James v. Alderton Dock Yards, Ltd., 256 N.Y. 298, 305, 176 N.E. 401, 403-04 (1931); Elkort v. 490 West End Ave. Co., 38 App. Div. 2d 1, 4, 326 N.Y.S.2d 406, 409 (1st Dep't 1971).

[19] Under the doctrine of continuing jurisdiction, a court which has properly exercised its power over a defendant's person retains jurisdiction to adjudicate all further proceedings arising out of the cause of action, even if the defendant is no longer amenable to process. *See, e.g.*, Michigan Trust Co. v. Ferry, 228 U.S. 346, 353 (1913); Estate of Einstoss v. Greenberg, 26 N.Y.2d 181, 187, 257 N.E.2d 637, 639-40, 309 N.Y.S.2d 184, 188 (1970); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 26, comment b, illustration 1; *id.* comment g, illustrations 9-10 (1971); R. LEFLAR, AMERICAN CONFLICTS LAW § 31 (3d ed. 1977).

[20] Many New York courts have found the concept of continuing jurisdiction applicable to family court and matrimonial proceedings. In these cases, the courts have held that after the entry of a judgment ordering alimony and child support, the original exercise of the judicial power over the parties "continues," thus permitting later modifications of such orders without an additional showing of a jurisdictional basis. *See, e.g.*, Baron v. Baron, 75 App. Div. 2d 797, 797-98, 427 N.Y.S.2d 510, 511 (2d Dep't 1980); Oster v. Oster, 54 App. Div. 2d 584, 584, 387 N.Y.S.2d 157, 158 (2d Dep't 1976); Iannone v. Iannone, 78 Misc. 2d 294, 295, 355 N.Y.S.2d 992, 994 (Family Ct. Suffolk County 1974); Anonymous v. Anonymous, 62 Misc. 2d 758, 759, 309 N.Y.S.2d 966, 968 (Sup. Ct. Queens County 1970); Massimino v. Massimino, 5 Misc. 2d 1041, 1044-45, 162 N.Y.S.2d 646, 649-50 (Sup. Ct. N.Y. County 1957); Grenier v. Grenier, 175 Misc. 406, 408, 23 N.Y.S.2d 594, 595-96 (Sup. Ct. Erie County 1940), *aff'd*, 261 App. Div. 1043, 27 N.Y.S.2d 449 (4th Dep't 1941). There is one case representing contrary authority in New York, which holds that an assertion of in personam jurisdiction does not "continue" in subsequent family court support proceedings. *See* Wasserman v. Wasserman, 43 App. Div. 2d 951, 952, 352 N.Y.S.2d 207, 208 (2d Dep't 1974). This case appears to be an aberration, however, for the concept of continuing in personam jurisdiction has not only been recognized by most New York courts, *see supra*, but has been acknowledged by the highest courts of numerous states as well, *see, e.g.*, Imperial v. Hardy, 302 So. 2d 5, 8 (La. 1974); Elliot v. Elliot, 431 A.2d 55, 57 (Me. 1981); Glading v. Furman, 282 Md. 200, 204-05, 383 A.2d 398, 401 (1978); Bjordahl v. Bjordahl, 308 N.W.2d 817, 818 (Minn. 1981); Everhart v. Everhart, 261 S.C. 322, 325, 200 S.E.2d 87, 88 (1973); Fortner v. Fortner, 282 S.E.2d 48, 51 (W. Va. 1981) (applying Virginia law); State *ex rel.* Ravitz v. Fox, 273 S.E.2d 370, 373 (W. Va. 1980); *see* Dorey v. Dorey, 609 F.2d 1128, 1131 (5th Cir. 1980) (applying California law).

[21] Anonymous v. Anonymous, 104 Misc. 2d 611, 615, 428 N.Y.S.2d 608, 611 (Family Ct.

seems that the court's interpretation does not comport with the statute's legislative purpose.

Moreover, it is submitted that the second department properly could have sustained jurisdiction by finding that the failure of a putative father to support his illegitimate child is a tortious act within the meaning of CPLR 302(a)(2).[22] A number of courts in other states have sustained jurisdiction in paternity suits under similar statutes, reasoning that the failure to support an illegitimate child is a breach of a legal duty.[23] Some state courts, however, have refused to interpret their "tortious act" long-arm statutes in this manner, opining that the main issue in a paternity proceeding is the establishment of paternity and that the question of financial support is merely ancillary.[24] Since New York's legisla-

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N.Y. County 1980) (quoting Memorandum of Assemblyman Blumenthal, *reprinted in* [1974] N.Y. LEGIS. ANN. 41). Although the legislative memorandum accompanying section 302(b) does not mention paternity suits, it seems that the statute's protection should be equally applied to the unwed mothers of illegitimate children who are likely to wind up on welfare. Indeed, the legislature has recognized this very real possibility by providing that proceedings to establish paternity and compel support may be commenced by a public welfare official "if the mother or child is or is likely to become a public charge . . . ." N.Y. FAM. CT. ACT (29A) § 522 (McKinney 1975 & Supp. 1981-1982).

[22] CPLR 302(a)(2) provides:

> (a) Acts which are the basis of jurisdiction. As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any nondomiciliary, or his executor or administrator, who in person or through an agent:
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> . . . .
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> 2. commits a tortious act within the state, except as to a cause of action for defamation of character arising from the act . . . .

CPLR 302(a)(2) (1972). The *Nilsa* court noted that jurisdiction would not be available under this section because "an act of consensual sexual intercourse is not a 'tortious act' within the meaning of that provision . . . ." 84 App. Div. 2d 295, 296 n.2, 445 N.Y.S.2d 579, 581 n.2. The court did not consider, however, the question whether the breach of the putative father's duty to support his illegitimate child would qualify as a "tortious act."

[23] *E.g.*, Poindexter v. Willis, 87 Ill. App. 2d 213, 217-18, 231 N.E.2d 1, 3 (App. Ct. 1967); Neill v. Ridner, 153 Ind. App. 149, 152, 286 N.E.2d 427, 429 (Ct. App. 1972); Howells v. McKibben, 281 N.W.2d 154, 156 (Minn. 1979); State *ex rel.* Nelson v. Nelson, 298 Minn. 438, 441, 216 N.W.2d 140, 142-43 (1974); *accord,* Larsen v. Scholl, 296 N.W.2d 785, 789 (Iowa 1980); *see* Poindexter v. Willis, 23 Ohio Misc. 199, 256 N.E.2d 254, 259 (1970) (giving full faith and credit to Illinois judgment using "tortious act" long-arm statute to support the exercise of jurisdiction over nonresident in paternity suit). Notably, the fear of fraudulent claims should be insufficient to justify the rejection of tortious act jurisdiction in paternity cases, for the courts may require "at least a minimal factual recitation of 'probable' fatherhood, beyond a bare allegation" of paternity. State *ex rel.* Nelson v. Nelson, 298 Minn. 438, 442, 216 N.W.2d 140, 143 (1974).

[24] *E.g.*, A.R.B. v. G.L.P., 180 Colo. 439, 442, 507 P.2d 468, 469 (1973); State *ex rel.* Larimore v. Synder, 206 Neb. 64, 69, 291 N.W.2d 241, 244 (1980); State *ex rel.* McKenna v. Bennet, 28 Or. App. 155, 160, 558 P.2d 1281, 1284 (Ct. App. 1977); Barnhart v. Madvig, 526

ture has made it quite clear that paternity proceedings are designed to promote the welfare of illegitimate children,[25] the issue of support is considered not an ancillary matter, but one of primary significance. Hence, those jurisdictions which regard failure to support as breach of a legal duty comport more closely with New York's statutory scheme, and, therefore, it is suggested that CPLR 302(a)(2) be applied to the nonresident putative father.[26]

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INSURANCE LAW

Ins. Law § 167(1): Child's infancy will not excuse requirement of timely notice to insurer in intrafamily claim

Liability insurance contracts generally provide that an insured must timely notify his insurer of a claim in order to invoke the insurer's obligation to defend and indemnify such claim.[27] Addi-

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S.W.2d 106, 108 (Tenn. 1975).

[25] *See* note 2 *supra.*

[26] If the exercise of jurisdiction is not to be had by resort to CPLR 302(a)(2) or 302(b), it is hoped that the legislature will provide a clear basis for jurisdiction in the paternity context. Long-arm statutes aimed specifically at exercising jurisdiction over nonresident putative fathers have been enacted in at least two states. *See* GA. CODE ANN. § 74-302(a) (1981); KAN. CIV. PRO. CODE ANN. § 60-308(b)(10) (Vernon 1965 & Supp. 1981-1982). In addition, eight other states have enacted versions of the Uniform Parentage Act which permits the assertion of in personam jurisdiction over any person whose act of sexual intercourse within the state causes a child to be conceived. *See* UNIFORM PARENTAGE ACT § 8(b). It is clear that statutes which base in personam jurisdiction upon the act of sexual intercourse within the state satisfy the minimum contacts test of due process. *E.g.*, Bebeau v. Berger, 22 Ariz. App. 522, 523, 529 P.2d 234, 235 (Ct. App. 1975); Bell v. Arnold, 248 Ga. 9, 9-10, 279 S.E.2d 449, 450 (1981); Neil v. Ridner, 153 Ind. App. 149, 154, 286 N.E.2d 427, 429 (Ct. App. 1972); Larsen v. Scholl, 296 N.W.2d 785, 790 (Iowa 1980); Howells v. McKibben, 281 N.W.2d 154, 157 (Minn. 1979); State *ex rel.* Larimore v. Snyder, 206 Neb. 64, 69, 291 N.W.2d 241, 245 (1980); Poindexter v. Willis, 23 Ohio Misc. 199, 210, 256 N.E.2d 254, 260 (1970); State *ex rel.* McKenna v. Bennett, 28 Or. App. 155, 558 P.2d 1281, 1283 (Ct. App. 1977).

[27] *See generally* 8 J.A. APPLEMAN & J. APPLEMAN, INSURANCE LAW AND PRACTICE § 4732 (1981). The purpose of the notice requirement in a liability insurance policy is to afford an insurance company an opportunity to investigate claims. Fidelity & Cas. Co. of New York v. Maryland Cas. Co., 51 Misc. 2d 116, 122, 273 N.Y.S.2d 112, 120 (Sup. Ct. Onondaga County 1966), *rev'd on other grounds*, 28 App. Div. 2d 815, 281 N.Y.S.2d 452 (4th Dep't 1967); 8 J.A. APPLEMAN & J. APPLEMAN, *supra*, § 4731, at 2; Note, *Liability Insurance Policy Defenses and the Duty to Defend*, 68 HARV. L. REV. 1436, 1436-37 (1955). Indeed, an insurance company in receipt of prompt notice is better able to prepare defenses because it can ob-